Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269

REPLY COMMENTS OF THE COMPETITIVE CARRIERS ASSOCIATION

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The Competitive Carriers Association ("CCA") hereby submits this reply in response to the opening comments filed in the above-captioned proceeding.[1]

INTRODUCTION

As CCA explained in its opening comments, the Commission's current approach to evaluating spectrum acquisitions—a decade-old, single-trigger "screen" that treats all spectrum the same, considers only local spectrum aggregation, and triggers only a more "detailed" competitive review, not a more stringent review—is an ineffectual tool for preventing excessive concentration of spectrum holdings. The record now reflects a groundswell of support for overhauling and strengthening this broken screen. Many stakeholders advance proposals that are closely aligned with CCA's core recommendations, including (1) a separate screen for local spectrum holdings below 1 GHz (to supplement the existing screen applicable to overall local holdings); (2) a new nationwide screen; (3) a clear and predictable mechanism for adding (or removing) spectrum from the analysis; and (4) a heightened level of scrutiny for transactions exceeding any applicable screen threshold. These and other reforms are critical if the Commission is to fulfill its "unique responsibility to ensure that spectrum is allocated in a

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[1] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, FCC 12-119 (rel. Sep. 28, 2012) ("NPRM").

manner that promotes actual and potential competition and that incentives are maintained for innovation and efficiency in the mobile services marketplace."[2]

Meanwhile, the two largest carriers in the industry—AT&T and Verizon—predictably urge the Commission to continue applying its broken spectrum screen largely without alteration, and to allow the industry to march further towards an irreversible duopoly.[3] AT&T and Verizon assert that adjusting the screen to account for the special competitive significance of low-frequency spectrum would be "arbitrary," even though the Commission has repeatedly recognized the importance of such spectrum to competitive carriers seeking to expand their networks. AT&T also claims that a new nationwide screen would be "duplicative" of local screens, ignoring the Commission's recent findings recognizing competitive harms on the national level that are not captured by local screens. And while the Twin Bells argue against the adoption of a rebuttable presumption against transactions exceeding screen thresholds, they fail to appreciate the important legal and policy justifications undergirding such an approach. The Commission thus should reject the self-serving efforts of AT&T and Verizon to weaken the Commission's spectrum aggregation analysis and instead adopt the vital reforms advanced by CCA and supported by many others.

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2 *Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589 ¶ 30 (2011) ("*AT&T-Qualcomm Order*").

3 AT&T goes much further at times and argues, in the alternative, that there should be no rules regulating spectrum aggregation *at all*. Comments of AT&T Inc., WT Docket No. 12-269, at 12, 20 (filed Nov. 28, 2012) ("AT&T Comments"). AT&T's dystopian desires in this regard would prevent the Commission from protecting and promoting competition in the wireless marketplace, which is "core to the FCC's statutory responsibilities." *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent to Assign AWS-1 Licenses,* WT Docket No. 12-4, Statement of Chairman Julius Genachowski (rel. Aug. 23, 2012).

DISCUSSION

I. THE RECORD SUPPORTS ADOPTION OF THE THREE INDEPENDENT THRESHOLDS PROPOSED BY CCA FOR IDENTIFYING POSSIBLE HARMS

As CCA has explained, the Commission should adjust its approach to evaluating spectrum aggregation in today's wireless industry by applying three independent thresholds to spectrum acquisitions: one targeted specifically at local spectrum holdings below 1 GHz, one that evaluates an entity's aggregate local spectrum holdings (both above and below 1 GHz), and one for nationwide holdings.[4] The record reveals that each of these three proposed thresholds has significant support among commenters of all stripes, including many large and small competitive carriers, public interest groups, industry analysts, and others. While Verizon and AT&T attempt to downplay the need for separate spectrum analyses for holdings below 1 GHz and for nationwide holdings, the specific objections they raise are unavailing and should not dissuade the Commission from adopting these much-needed reforms.

A. Spectrum Holdings Below 1 GHz in Local Markets

The vast majority of commenters agree with CCA that the Commission should develop a formal mechanism to account for the special competitive significance of spectrum below 1 GHz in its spectrum aggregation analysis. Multiple parties, including T-Mobile and the Computer & Communication Industry Association ("CCIA"), support CCA's specific proposal for adopting a separate spectrum screen threshold for local spectrum holdings below 1 GHz—recognizing, as the Commission does, that access to low-frequency spectrum is "important for other competitors to meaningfully expand their provision of mobile broadband services or for new entrants to have

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4 *See* Comments of the Competitive Carriers Association, WT Docket No. 12-269, at 9 (filed Nov. 28, 2012) ("CCA Comments").

a potentially significant impact on competition."[5] T-Mobile correctly explains that low-frequency spectrum has "more favorable propagation characteristics [that] allow for better coverage inside buildings and across larger geographic areas," and "can deliver more received signal power to locations within a same-size cell as systems operating in higher-band spectrum."[6] CCIA likewise notes that the propagation characteristics inherent to low-frequency spectrum enable competitive carriers to "deliver more signal power and superior performance to consumers than higher-band spectrum operating with the same-sized cell."[7] These efficiencies are particularly beneficial to competitive carriers seeking to expand their networks at relatively low cost in response to growing consumer demand for mobile wireless service. CCIA also recommends that the Commission implement a separate screen for spectrum below 1 GHz before the upcoming broadcast incentive auction.[8] CCA agrees with this recommendation, particularly in light of the fact that, as CCIA points out, the auction involves "[o]ne of the last pools of readily available low-frequency spectrum" on the market for the foreseeable future.[9]

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5 *AT&T-Qualcomm Order* ¶ 51.

6 *See* Comments of T-Mobile USA, WT Docket No. 12-269, at 15 (filed Nov. 28, 2012) ("T-Mobile Comments"). T-Mobile supports a screen for spectrum below 1 GHz in the context of secondary market transactions, and a hard cap for such spectrum in the auction context. Other parties, such as Sprint and the Rural Telecommunications Group ("RTG"), support the imposition of a hard cap on spectrum below 1 GHz for auctions *and* secondary market transactions. *See* Comments of Sprint Nextel Corp., WT Docket No. 12-269, at 4 (filed Nov. 28, 2012) ("Sprint Comments"); Comments of the Rural Telecommunications Group, WT Docket No. 12-269, at 8 (filed Nov. 28, 2012).

7 Comments of the Computer & Communication Industry Association, WT Docket No. 12-269, at 11 (filed Nov. 28, 2012) ("CCIA Comments").

8 *Id.* at 10-11.

9 *Id.* Implementing this separate screen prior to the upcoming broadcast incentive auction would also be consistent with Chairman Genachowski's recent Congressional testimony, indicating his desire to complete this proceeding prior to releasing incentive auction rules. *Keeping the New Broadband Spectrum Law on Track: Hearing Before the Subcomm. on Communications and Tech. of the H. Comm. on Energy & Commerce*,

Numerous other commenters agree more generally that any future tool for evaluating spectrum aggregation should, at a minimum, "recogniz[e] differential values of spectrum with varying propagation characteristics."[10] Several of these parties propose innovative solutions for accounting for the differences between low- and high-frequency spectrum, including a system that would "weight spectrum by frequency, where weights reflect the extent to which spectrum at that frequency yields lower costs for the deployment and operation of equipment."[11] While CCA continues to believe that a separate screen for spectrum below 1 GHz likely offers the simplest and most effective way to account for that spectrum's special competitive characteristics, the Commission should remain open to exploring these alternative means of restoring competitive balance to the wireless industry.

In the face of this overwhelming support for giving special consideration to low-frequency spectrum, AT&T and Verizon contend that adopting any separate metric for spectrum

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112th Cong. 67 (2012) (testimony of Hon. Julius Genachowski, Chairman, Federal Communications Commission), *preliminary transcript available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Transcript-Broadband-Spectrum-Law-2012-12-12.pdf.

[10] Comments of the Internet Innovation Alliance, WT Docket No. 12-269, at 3 (filed Nov. 28, 2012) ("IIA Comments"); *see also* Comments of MetroPCS, WT Docket No. 12-269, at 14-15 (filed Nov. 28, 2012) ("MetroPCS Comments") (urging the Commission to account for "the different characteristics of particular channels," which "affect how they can be used to deliver mobile services to consumers"); Comments of Free Press, WT Docket No. 12-269, at 11 (filed Nov. 28, 2012) (explaining that "[i]f the Commission maintains a case-by-case evaluation approach, it has the flexibility and the duty to consider the difference in value between spectrum blocks, which is determined by wavelength, contiguous block size, block pairing, interference issues, market density and market demographics").

[11] Comments of Public Knowledge, WT Docket No. 12-269, at 5 (filed Nov. 28, 2012); *see also, e.g.*, Sprint Comments at 12 (urging the Commission to explore "assigning relative value-weightings to different spectrum bands based on prices paid at auction and in secondary-market spectrum transactions"); Comments of Writers Guild of America, WT Docket No. 12-269, at 4 (filed Nov. 28, 2012) ("WGA Comments") (urging the Commission to "develop a system that weights valuable spectrum and limits the amount of such spectrum that any one company can control").

below 1 GHz would entail making "arbitrary distinctions among bands."[12] But making such a distinction in the Commission's formal spectrum aggregation review process would be far from "arbitrary"; as noted above, the Commission has consistently recognized that "low-band spectrum can provide the same geographic coverage, at a lower cost, than higher-frequency bands," whereas "[a] licensee that exclusively or primarily holds spectrum in a higher frequency range generally must construct more cell sites (at additional cost) than a licensee with primary holdings at a lower frequency in order to provide equivalent service coverage, particularly in rural areas."[13] The ability to expand the geographic coverage of a wireless network at relatively low cost is vitally important to competitive carriers seeking to increase scale in order to compete with the likes of AT&T and Verizon. AT&T protests that "the challenge providers face is one of a shortage of capacity," not a lack of coverage.[14] While that assertion may be true for AT&T (due largely to its inefficient use of spectrum resources), it ignores the real coverage needs (including better in-building coverage) of competitive wireless carriers attempting to compete

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12 Comments of Verizon Wireless, WT Docket No. 12-269, at 28 (filed Nov. 28, 2012) ("Verizon Comments"); *see also* AT&T Comments at 61 (arguing that the Commission should not "make arbitrary distinctions among spectrum bands based on whether the spectrum is above or below 1 GHz").

13 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664 ¶ 293 (2011) ("*15th Mobile Wireless Competition Report*"); *see also AT&T-Qualcomm Order* ¶ 51 (explaining that spectrum below 1 GHz has "technical attributes important for other competitors to meaningfully expand their provision of mobile broadband services or for new entrants to have a potentially significant impact on competition"); *Service Rules for the 698-746, 747-762 and 777-792 MHz Band*, Second Report and Order, 22 FCC Rcd 15289 ¶ 158 (2007) (noting that the 700 MHz band's "excellent propagation characteristics make it ideal for delivering advanced wireless services to rural areas," thus enabling "small and rural providers" to "play an important role in bringing new services to consumers").

14 AT&T Comments at 64.

against AT&T, as well as the millions of Americans in rural areas without *any* mobile wireless broadband coverage.[15]

Indeed, as CCIA points out in its comments, both AT&T and Verizon have acknowledged in other contexts the special competitive significance of low-frequency spectrum. AT&T asserted in its Application to acquire T-Mobile that T-Mobile's customers would benefit from "their newly acquired access to AT&T's spectrum below 1 GHz, enabling those customers to receive both extended rural coverage and 'superior in-building and in-home service' due to access to AT&T's spectrum below 1 GHz."[16] Similarly, Verizon has told investors that it enjoys a "'spectrum advantage'" stemming from the "'better in-building penetration' and 'increased coverage'" of its low-frequency spectrum.[17] AT&T and Verizon can hardly maintain that separate consideration of low-frequency spectrum would be "arbitrary" when they themselves boast their holdings below 1 GHz give them a competitive edge. Given that AT&T and Verizon readily acknowledge the effect that spectrum below 1 GHz has on competition, the Commission should revise the screen – a tool it uses specifically to examine and safeguard competition – to reflect this competitive reality. The Commission thus should reject the efforts of AT&T and Verizon to maintain their entrenched positions and adjust its spectrum screen analysis to target

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15 *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Progress Report, FCC 12-90, ¶ 86, Table 14 (2012) (reporting that, as of June 2011, 19.7 million Americans resided in areas without access to mobile broadband services at speeds of at least 3 Mbps/768 kbps).

16 *AT&T-Qualcomm Order* ¶ 49 (citing AT&T's Application to the Commission as part of its ultimately abandoned bid to acquire T-Mobile).

17 CCIA Comments at 12 (quoting Presentation of Tony Malone, Senior Vice President and Chief Technology Officer, Verizon Wireless, Wells Fargo Securities Technology, Media & Telecom Conference at 12-13 (Nov. 10, 2010)).

the aggregation of low-frequency spectrum, in particular by adopting the separate screen threshold proposed by CCA and endorsed by others.

B. Aggregate Spectrum Holdings in Local Markets

There is no serious dispute among commenters that, as part of any new model for evaluating the competitive effects of spectrum acquisitions, the Commission should continue to examine an entity's aggregate spectrum holdings in each local market where it is acquiring new licenses. Commenters as diverse as Sprint, MetroPCS, US Cellular, Clearwire, the Internet Innovation Alliance, Mobile Future, TechFreedom, and others all agree with CCA's proposal to retain the screen-based approach for analyzing local aggregate spectrum holdings.[18] Even AT&T and Verizon appear (at times) to support the continued application of the spectrum screen for local aggregate holdings. AT&T asserts that the local screen "gives the Commission the flexibility to reach the correct result for spectrum transfers that exceed the screen while giving industry the certainty required to encourage investment,"[19] and Verizon similarly praises the local screen as "promot[ing] competition and the public interest," "reducing regulatory uncertainty," and "streamlining administrative review."[20] AT&T also half-heartedly suggests, however, that "the Commission should be asking whether any spectrum cap *or* screen is necessary at all, given how unlikely it is that any competitor could amass so much spectrum that

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18 *See* Sprint Comments at 9; MetroPCS Comments at 16; Comments of United States Cellular Corporation, WT Docket No. 12-269, at 3-4 (filed Nov. 28, 2012) ("US Cellular Comments"); Comments of Clearwire Corp., WT Docket No. 12-269, at 4-5 (filed Nov. 28, 2012) ("Clearwire Comments"); IIA Comments at 3; Comments of Mobile Future, WT Docket No. 12-269, at 5 (filed Nov. 28, 2012) ("Mobile Future Comments"); Comments of TechFreedom, WT Docket No. 12-269, at 5 (filed Nov. 28, 2012).

19 AT&T Comments at 22.

20 Verizon Comments at 6.

it could impede competition in the context of today's wireless marketplace,"[21] but this suggestion is entirely untethered from reality. As AT&T is well aware, the Department of Justice ("DOJ") blocked AT&T's bid to acquire T-Mobile in large part because the combined entity's spectrum holdings would severely hinder competition in today's increasingly duopolistic wireless industry.[22] The significant risk of competitive harm identified by the Commission and DOJ underscores the need to retain—indeed, to strengthen—the spectrum screen for local aggregate holdings as part of any future evaluative tool.

AT&T and Verizon also posit that "the screen threshold could reasonably be set at a higher level" than one-third of the spectrum deemed available for mobile broadband use in a particular local market.[23] But they provide no credible justification for further weakening the screen in this way, and their proposal finds no support among any of the other commenters in this proceeding. Indeed, setting a screen threshold for local aggregate spectrum holdings *above* one-third would run directly counter to this Commission's previous conclusions over the past two years that the wireless marketplace could not be characterized by effective competition[24], and disregard the DOJ's conclusion that a strong wireless industry requires at least *four*

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21 AT&T Comments at 12 (emphasis in original).

22 *See Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, 26 FCC Rcd 16184 ¶¶ 42-47 (WTB 2011) ("*AT&T-T-Mobile Staff Analysis*"); Amended Complaint, *United States of America v. AT&T Inc., et al.*, Case No. 1:11-01560, ¶¶ 35, 45 (D.D.C. Sept. 16, 2011) ("*DOJ AT&T-T-Mobile Complaint*").

23 Verizon Comments at 37; *see also* AT&T Comments at 35 (stating that the Commission should "consider increasing the screen to a level above one-third of the available and suitable spectrum").

24 *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664 ¶ 2 (2011); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407 ¶ 3 (2010).

nationwide wireless carriers.[25] The Commission should reject AT&T's and Verizon's transparent attempt to clear the way for an unchecked duopoly in the wireless marketplace.

C. New Nationwide Spectrum Screen

CCA's proposal for a separate threshold that applies on a nationwide basis similarly finds strong support in the record from carriers, industry groups, and public interest advocates alike.[26] As Sprint points out, a separate nationwide screen is particularly well-suited to today's wireless industry, where it seems every year brings a new transaction that, like "the withdrawn AT&T/T-Mobile transaction, raise[s] spectrum aggregation issues that implicate competition on a national level."[27] The Commission has repeatedly affirmed that the competitive effects of major spectrum transactions are increasingly national in scope, given that pricing, advertising, and competition to offer cutting-edge devices often play out on a national scale.[28]

AT&T nevertheless disputes the necessity of a separate nationwide screen, claiming that such a tool would be "superfluous" to the local screen for aggregated spectrum holdings.[29] But AT&T ignores the fact that the Commission expressly designed the local screen to evaluate the risk of competitive harm *only* at the local level, and that the Commission has recognized that

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25 *DOJ AT&T-T-Mobile Complaint* ¶ 36.

26 *See, e.g.*, Sprint Comments at 13 (supporting "applying the spectrum screen . . . on a nationwide basis"); CCIA Comments at 18 (urging the Commission to "implement the spectrum screen at [the] national level[]"); *see also, e.g.*, WGA Comments at 10-11 (urging the Commission to adjust its current approach to examine the "national effects of spectrum aggregation"); Free Press Comments at 14 n.32 (asserting that the Commission should "consider the impact of transactions on competition at a national level").

27 Sprint Comments at 13.

28 *See* NPRM ¶ 31 (citing *AT&T-Qualcomm Order* ¶¶ 32, 34; *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698 ¶ 58 (2012) ("*Verizon-SpectrumCo Order*")).

29 AT&T Comments at 77.

wireless transactions increasingly entail a separate set of nationwide effects not specifically accounted for under the local screen.[30] Moreover, under CCA's proposal for a nationwide screen, the applicable threshold would be set slightly lower than the threshold for evaluating local aggregated spectrum holdings, thereby ensuring that the nationwide screen would not be "duplicative" of the local screen and would advance the government's goal of preserving four nationwide carriers in the marketplace.[31]

AT&T's other contention—that the "broad variety of possible weighting schemes" for a nationwide screen would create "irresolvable controversy" that would "undermine the clarity and predictability of the local screens"—is equally meritless.[32] The Commission can easily resolve any such "controversy" if and when it adopts a nationwide screen by stating clearly which method for calculating national holdings it will apply.[33]

II. THE RECORD ALSO SUPPORTS CCA'S PROPOSED REFORMS FOR COUNTING SPECTRUM UNDER THE REVISED SCREEN

In addition to proposing these new screen thresholds, CCA's opening comments also urged the Commission to clarify which spectrum holdings would be counted under the revised screens, such as by formally eliminating from the screens the portions of the SMR band and the Upper 700 MHz D Block that are no longer suitable for mobile broadband.[34] Several other

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30 *See, e.g., AT&T-Qualcomm Order* ¶ 35 (finding that "it is appropriate also to analyze both the local markets in which consumers purchase mobile wireless services and the potential national competitive impacts of this transaction"); *see also Verizon-SpectrumCo Order* ¶¶ 57-58; *AT&T-T-Mobile Staff Analysis* ¶¶ 33-34.

31 CCA Comments at 13-14.

32 AT&T Comments at 77-78.

33 *See* NPRM ¶ 34 (suggesting various possibilities for calculating spectrum holdings at the national level, such as on a "MHz*POPs" basis or on a "population-weighted average megahertz" basis).

34 CCA Comments at 14.

commenters agree. Sprint—along with CCIA, Free Press, and others—correctly points that "the Commission's rules do not permit high-capacity, low-site, frequency reuse network architecture" in 12.5 MHz of the SMR block and thus preclude carriers from using that spectrum to provide mobile broadband service.[35] Numerous parties also concur with CCA's proposal to eliminate the 10 MHz in the Upper 700 MHz D Block that Congress has reallocated for public safety use.[36] CCA nevertheless acknowledges that this D Block spectrum may someday become available for commercial use once more, to the extent FirstNet allows commercial carriers to share that spectrum when not required for public safety communications. CCA therefore agrees that the Commission should consider adding back that spectrum once the viability of such sharing arrangements is better understood.[37]

As for new spectrum to be included in the revised screen, nearly all commenters—even including AT&T and Verizon—appear to agree with CCA's proposal to move forward with a process for incorporating newly suitable bands into the Commission's spectrum aggregation analysis.[38] The Commission recently took a significant step in the right direction when it found, as part of its review of the AT&T-NextWave transaction, that "20 megahertz of WCS spectrum—comprised of the paired A and B Blocks—are suitable and available for the provision of mobile telephony/broadband services and should therefore be added to the spectrum screen."[39]

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35 Sprint Comments at 10 n.17; *see also* CCIA Comments at 9-10; Free Press Comments at 19.

36 *See, e.g.,* US Cellular Comments at 4-5; Free Press Comments at 19; Sprint Comments at 10 n.18; CCIA Comments at 9; Mobile Future Comments at 8 n.18.

37 *See* NPRM ¶ 29; Sprint Comments at 10 n.18.

38 *See, e.g.,* AT&T Comments at 42; Verizon Comments at 18-20; Sprint Comments at 10; Mobile Future Comments at 8.

39 *See Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego*

The Commission also correctly concluded that it should not "include in the screen additional BRS spectrum [and] EBS spectrum,"[40] in line with the view of CCA and other commenters in this proceeding.[41] These commenters have demonstrated that further inclusion of this spectrum is inappropriate at this time. In fact, inclusion of additional BRS and EBS spectrum would subvert competition and the objectives of the spectrum screen by giving AT&T and Verizon significantly more leeway under the screen to further their spectrum aggregation goals. While there continues to be wide variation among commenters as to which additional bands to include in the screen moving forward, these competing proposals only underscore the necessity of a clear and predictable mechanism for incorporating additional bands—as CCA proposed in its opening comments and as many other parties support.[42] Such a process would put an end to the uncertainty created by the Commission's occasional *ad hoc* revisions to the screen and, by establishing specific deadlines by which certain bands would be deemed available for mobile broadband, would preserve incentives to build out spectrum in those bands.

Meanwhile, the record reflects near-unanimous support for raising the Commission's current attribution threshold from 10 percent equity ownership interest to a level that captures only those interests that give entities a competitively significant degree of control over the

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Gas & Electric Company for Consent To Assign And Transfer Licenses, WT Docket No. 12-240, Memorandum Opinion and Order, FCC 12-156, ¶ 31 (2012).

40 *Id.* ¶ 32.

41 CCA Comments at 15; *see also* Sprint Comments at 13 n.26; Clearwire Comments at 5-7.

42 CCA Comments at 15; *see also, e.g.*, Verizon Comments at 27 (asserting that the Commission "should establish a mechanism by which the spectrum screen is consistently and accurately modified"); Comments of CTIA – The Wireless Association, WT Docket No. 12-269, at 6 (filed Nov. 28, 2012) (proposing that the Commission should "update the spectrum included in the spectrum screen denominator at regular benchmarks to take into account changes in the spectrum available for mobile services").

spectrum at issue.[43] Multiple commenters echo CCA's observation that, in other contexts, Congress and the Commission have concluded that 25 percent is a more appropriate threshold for identifying competitively significant holdings, such as in the foreign ownership setting.[44] CCA agrees with these commenters that an upward adjustment to 25 percent would "promote increased investment into the industry without compromising the FCC's ability to examine competitively significant ownership interests."[45]

III. THE COMMISSION SHOULD STRENGTHEN, NOT RELAX, ITS COMPETITIVE REVIEW OF TRANSACTIONS EXCEEDING THE SCREEN

As explained in CCA's opening comments, the Commission also should adopt a heightened level of competitive scrutiny in markets where a transaction exceeds the applicable threshold, by creating a rebuttable presumption that such a transaction would be anticompetitive and contrary to the public interest in those areas.[46] MetroPCS advances a similar proposal in its comments, urging the Commission to establish "a rebuttable presumption that [an] acquisition of spectrum will not serve the public interest" in "instances when the spectrum screen is exceeded."[47] CCA agrees with MetroPCS that adopting such a rebuttable presumption would accomplish a number of important goals, including "increasing certainty" in the Commission's

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43 *See, e.g.,* AT&T Comments at 79; Verizon Comments at 41; MetroPCS Comments at 18; Clearwire Comments at 2; CCIA Comments at 23-24; CCA Comments at 16.

44 *See* Clearwire Comments at 2 (noting that raising the attribution level to 25 percent "would bring the attribution rules in line with the Commission's foreign ownership rules where Congress has determined that a 25% or greater foreign ownership interest is the appropriate trigger"); CCIA Comments at 23 (pointing out that, "[i]n other contexts, the Commission has viewed ownership limits of twenty percent, twenty-five percent, or an even greater percentage as a threshold that indicates control"); *accord* CCA Comments at 16.

45 Clearwire Comments at 7; *see also* CCIA Comments at 24 ("By allowing more flexible attribution rules, the Commission could encourage capital investment.").

46 *See* CCA Comments at 16-18.

47 MetroPCS Comments at 11.

spectrum aggregation analysis while "maintaining flexibility" for the Commission to consider persuasive and procompetitive justifications for exceeding screen thresholds.[48] Most of all, such an approach would ensure that the burden of proof regarding the public interest impact of a particular transaction lies with the appropriate party—that is, with the applicant seeking to acquire additional, scarce spectrum resources, and not with the Commission or with parties petitioning to deny the transaction.[49]

AT&T and Verizon predictably oppose efforts to strengthen the Commission's competitive analysis of potentially harmful spectrum acquisitions, but their objections are without merit. Verizon vaguely asserts that "a strong presumption against approval would operate in similar fashion to a hard cap and would share the same problems."[50] But courts and the Commission have repeatedly recognized the significant difference between a case-by-case analysis entailing a rebuttable presumption and an outright prohibition subject to limited waiver opportunities.[51] Unlike a hard cap, a screen with a rebuttable presumption still would enable an

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48 *Id.*

49 Notably, the DOJ and the Federal Trade Commission ("FTC") have adopted a similar presumption for transactions exceeding certain concentration thresholds as measured by the Herfindahl-Hirschman Index ("HHI"). Under the revised Horizontal Merger Guidelines developed by DOJ and FTC in 2010, transactions that result in a "highly concentrated market" (HHI above 2500) and involve an increase in HHI of more than 200 points are "presumed to be likely to enhance market power," and this presumption can be rebutted only by "persuasive evidence showing that the merger is unlikely to enhance market power." *See* U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

50 Verizon Comments at 13 (citation omitted).

51 *See, e.g., Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 35 (2010) (declining to ban all exclusive contracts involving terrestrially delivered, cable-affiliated regional sports networks, and instead adopting a "case-by-case approach" coupled with a "rebuttable presumption" against such contracts in order to "address whether [these] practices significantly hinder competition in particular cases"); *Cablevision Sys. Corp. v.*

applicant to demonstrate, by a preponderance of the evidence that exceeding the screen would be in the public interest. Under CCA's proposal, the Commission would be able to consider a wide range of factors when determining whether an applicant has successfully rebutted the presumption, including the applicant's purported need for the spectrum in order to meet unusually high demand in areas where other wireless carriers have not deployed; the availability of less competitively harmful options to meet consumer demand; and the particular challenges faced by carriers seeking to provide wireless broadband service in rural areas, among other factors.[52] Thus, CCA's proposal strikes the appropriate balance between the need for stringent competitive review of potentially harmful spectrum transactions and the need for flexibility to allow for increased holdings where the public interest so warrants.

On a related note, AT&T asserts without support that adopting a rebuttable presumption "would stray beyond the Commission's statutory duty to promote the public interest."[53] But there can be no serious argument that the Commission lacks authority to prevent excessive spectrum aggregation through an appropriately designed screen. Indeed, if that were the case, then the Commission's pre-2001 spectrum cap would have "stray[ed]" even *further* beyond the Commission's statutory authority—and yet no party seriously contests that the Commission had authority to implement a cap under the market conditions that prevailed at that time. Moreover, as noted in the NPRM, Congress recently bolstered the Commission's statutory authority in this regard by enacting Section 6404 of the Spectrum Act, which "reaffirm[ed] the Commission's authority 'to adopt and enforce rules of general applicability, including rules concerning

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FCC, 649 F.3d 695, 721 (D.C. Cir. 2011) (upholding Commission's choice of a case-by-case analysis over an outright ban in the program access context, noting that the "rebuttable presumption" adopted by the Commission "represent[s] a narrowly tailored effort" to further its asserted interest in competition).

52 *See* CCA Comments at 17-18.

53 AT&T Comments at 34.

spectrum aggregation that promote competition.'"[54] Adopting a rebuttable presumption as part of a revised spectrum screen would be well within this statutory grant of authority, as well as the Commission's broad authority under Title III, including its Section 310(d) responsibility to ensure that license transfers are in the public interest.[55]

Finally, the Commission should reject calls by AT&T and Verizon to establish an absolute "safe harbor" for transactions that do not exceed any of the screen thresholds set forth above.[56] By entirely foreclosing competitive review in such instances, a safe harbor would deprive the Commission of the ability to evaluate the competitive effects on a case-by-case basis—thus eliminating the very flexibility that AT&T and Verizon espouse elsewhere in their comments.[57] In particular, the Commission would be unable to assess other competitive dimensions of spectrum transactions that may not be captured by simply measuring spectrum aggregation levels—such as subscriber counts, network deployment, access to advanced devices and equipment, or any unique barriers to entry or other special characteristics of a given local market. The Commission thus should decline the Twin Bells' invitation to hamstring its efforts to protect the public interest from undue concentration in the wireless industry.

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54 NPRM ¶ 3 (quoting Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6404 ("Spectrum Act")).

55 47 U.S.C. § 310(d).

56 *See* AT&T Comments at 54-55; Verizon Comments at 6-11.

57 *See, e.g.*, AT&T Comments at 8 (criticizing bright-line spectrum limits as "eliminat[ing] all flexibility in the name of predictability"); Verizon Comments at 14 (criticizing cap-based proposals as "inherently inflexible and thus ill-suited for the dynamic wireless market").

CONCLUSION

The record in this proceeding confirms that the Commission's current approach to evaluating spectrum aggregation is in need of reform, and reflects not only the overwhelming support among commenters for strengthening the spectrum screen, but also the relative isolation of the Twin Bells in their misguided opposition to such efforts. CCA continues to believe that the various proposals advanced in its opening comments represent the best path to reform, and looks forward to working with the Commission in exploring these proposals further.

Respectfully submitted,

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